

mechanisms, “Riders DSE,” and their initial benchmark reports. *Application* at 1.¹ The Public Utilities Commission of Ohio’s (PUCO’s or Commission’s) approval would allow FirstEnergy to begin implementing its energy efficiency and peak demand reduction programs to meet Ohio’s Alternative Energy Portfolio Standards (AEPS), reflected in O.R.C. §4928.66, and to recover costs associated with these programs. On December 29, 2009, the Environmental Law and Policy Center (ELPC) filed a Motion to Intervene in these proceedings.

On January 7, 2010, the Companies filed a Memorandum Contra to ELPC’s Motion to Intervene (“Memo Contra”). FirstEnergy claims that ELPC does not meet the legal requirements to intervene. *Memo Contra* at 2. The Companies allege that ELPC did not identify its interest in, or potential damage from, the Application, its legal positions, its expertise in energy efficiency and peak demand reduction, or how other intervenors do not represent ELPC’s interests. These arguments are without merit, and ELPC asks the Commission to grant the Motion.

Ohio Revised Code §4903.221 states that “Any other person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding....”

Before granting ELPC’s motion, the Commission must consider the factors in O.R.C. §4903.221:

- (1) The nature and extent of the prospective intervenor’s interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; [and]
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

¹ FirstEnergy states that ELPC’s interest “is limited to the Companies’ three-year energy efficiency and peak demand reduction (“EE&PDR”) portfolio plan.” *Application* at 1-2. To the extent FirstEnergy is referencing the three cases existing before December 15, 2009, ELPC notes that FirstEnergy filed its Application under the nine consolidated case numbers. ELPC’s intervention in one case necessarily includes intervention in all of the consolidated matters. Despite this, ELPC has an interest in each portion of the Application filed on December 15, 2009. FirstEnergy’s hairsplitting is inapplicable given its decision to file one consolidated Application.

O.R.C. §4903.221(B). Similarly, the Commission’s own rules at OAC §4901-11-1 dictate consideration of four similar factors, plus a fifth:

- (1) The nature and extent of the prospective intervenor’s interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues; [and]
- (5) The extent to which the person’s interest is represented by existing parties.

Ohio Admin. Code §4901-11-1(B).

ELPC meets the requirements stated in O.R.C. §4903.221 and O.A.C. §4901-11-1(B), as discussed in its Motion to Intervene and as further detailed below. Consequently, ELPC asks this Commission to grant the Motion to Intervene.

II. Argument

Nowhere in the Memo Contra do the Companies recognize the Commission’s policy to, as stated in ELPC’s Motion to Intervene, “encourage the broadest possible participation in its proceedings.” *Cleveland Elec. Illum. Co.*, Case No. 85-675-EL-AIR, Entry dated January 14, 1986, at 1. In that case, CEI opposed several organizations’ motions to intervene on the basis that other parties adequately represented them. *Id.* at 1. The PUCO determined that it must consider “whether a potential party’s participation will contribute to a just and expeditious resolution of the issues involved and whether granting intervention would unduly delay the proceeding,” but that broad participation is preferred. *Id.* The Supreme Court of Ohio, in a 2006 case addressing motions to intervene before the PUCO, reinforced this “inclusive” standard. In that case, the Ohio Consumer’s Counsel’s appealed the PUCO’s decision to deny intervention under O.R.C. §4903.221 and O.A.C. §4901-1-11-01. In reversing the PUCO, and granting

OCC's motion to intervene, the Court held, "intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO." *Ohio's Consumer Counsel v. PUCO*, (2006) 111 Ohio St. 3d 384, 388. The Court determined that the OCC showed the necessary facts needed to meet the statutory and regulatory requirements:

The Consumers' Counsel explained her interest in the cases in her motions to intervene and also explained that her views would not be adequately represented by the existing parties. In the absence of some evidence in the record calling those claims into doubt or showing that intervention would unduly prolong or delay the proceedings, intervention should have been granted.

Id. As explained below, ELPC has a real and substantial interest in this case.

FirstEnergy attacks ELPC's motion to intervene at every turn. If FirstEnergy truly "recognizes the importance of energy efficiency and [is] committed to providing cost-effective energy efficiency savings opportunities," it should welcome the inclusion of additional perspectives and backgrounds in order to develop the most effective programs possible.

Application at 1. Instead, FirstEnergy seeks to exclude ELPC. Furthermore, FirstEnergy has not provided any evidence showing that ELPC does not meet the intervention requirements, as required by the Supreme Court. Instead, FirstEnergy only makes blanket statements about ELPC's Motion. For this reason, ELPC asks the PUCO to grant its Motion. In addition, ELPC has a deep and long-standing interest in energy efficiency issues and easily meets the criteria for intervention. ELPC is not only intervening in this proceeding, it plans to actively participate in the stakeholder collaborative.²

² Despite ELPC's attempt to contact FirstEnergy as early as December 4, 2009, and several occasions thereafter, the Companies have not provided ELPC with any information about future meetings, topics, or other substantive information.

Consistent with the criteria for intervention, the Application will impact ELPC and its members, ELPC's legal interest will not unduly delay these proceedings, ELPC's experience and expertise in establishing successful energy efficiency programs will aide the Commission, and other parties do not represent ELPC's interests. Taken together, ELPC meets the requirements to intervene in this case, and it respectfully asks this Commission to grant its Motion.

A. The Proceedings May Adversely Affect ELPC and its Members.

Principally, FirstEnergy questions ELPC's presence in Ohio. ELPC has members in Ohio, and has an office in Ohio that focuses on Ohio energy and environmental issues. ELPC members are located throughout FirstEnergy's service territory, including Cleveland, Akron, Toledo, and Youngstown. FirstEnergy's programs will affect these ELPC members through energy efficiency opportunities and electricity costs. In addition, emissions from FirstEnergy's generating stations affect ELPC members. Effective energy efficiency programs directly impact the operating time of power plants. If FirstEnergy's programs to reduce electricity consumption are not efficient or effective, this will lead to increased plant operations and emissions affecting the health of ELPC members. Moreover, air emissions from FirstEnergy's plants travel throughout the Midwest, including Indiana, Michigan, and Illinois, where additional ELPC members reside.

B. ELPC's Legal Position Will Not Delay These Proceedings.

FirstEnergy asserts that ELPC "has not explained its legal position and its probable relation to the merits of this proceeding." *Memo Contra* at 3. While ELPC's Motion to Intervene is the wrong stage of the proceedings to discuss detailed legal theories and arguments, ELPC states in its Memorandum in Support that its interest is to ensure that the programs and plans proposed by FirstEnergy meet Ohio's standards for approval consistent with ORC §4928.66.

Memo in Support at 4. The Commission should not take for granted that FirstEnergy's programs are the best possible means to address energy efficiency and peak demand reduction in Ohio. Because of the impacts on ELPC and its members in Ohio, ELPC wants to ensure FirstEnergy's proposals meet the applicable legal requirements, and if not, suggest modifications to achieve compliance. At the intervention stage, before discovery begins and testimony is complete, this statement of interest satisfies the requirement that ELPC explain its legal position and relation to the merits.

FirstEnergy then argues, "The Commission cannot determine whether ELPC's intervention would unduly delay or prolong the proceedings." *Memo Contra* at 3. ELPC notes that other parties have intervened without FirstEnergy challenging or questioning their potential delay. FirstEnergy filed its Application on December 15, 2009, and thus far, twelve parties seek to intervene. FirstEnergy only opposes ELPC. ELPC commits to working within the schedule set by the Commission. However, the Commission has not even issued a scheduling order in this case, so it is impossible to know the Commission's timeline. FirstEnergy is suggesting that ELPC will delay the proceeding in the absence of a schedule. As set forth above, ELPC intends to evaluate the merits of FirstEnergy's programs, which is entirely consistent with the purpose of the proceeding. FirstEnergy fails to explain why ELPC's involvement will significantly affect the process of this case differently than any of the other existing intervenors. For these reasons, ELPC meets the requirements to show its legal interest and that it will not unduly delay the proceedings.

C. ELPC's Expertise Will Assist in the Full Development and Resolution of this Case.

FirstEnergy questions ELPC's claims regarding its expertise, and submits that ELPC's arguments are conclusory. *Memo Contra* at 4. ELPC believes that its statement in its

Memorandum satisfies this requirement. FirstEnergy implies that intervenors in PUCO proceedings must present evidence of their qualifications and experience in their motion to intervene. However, FirstEnergy is not questioning the qualifications of intervenors making blanket statements concerning their qualifications, such as “OMA...can make a contribution to the proceeding, and will not unduly delay the proceeding or prejudice any existing party.” *See The Ohio Manufacturer’s Association Motion for Leave to Intervene*, at 2 (filed January 6, 2010).³

If the Commission needs further explanation of ELPC’s expertise, the organization has been involved in the development of energy efficiency efforts around the Midwest over the past decade. Since 2008, ELPC has intervened in energy efficiency proceedings in Illinois, Iowa and Michigan, submitting expert testimony analyzing efficiency programs and making recommendations regarding improvement of the programs. ELPC currently participates in stakeholder processes in those states. ELPC’s expert witness Geoff Crandall has analyzed efficiency programs and served as an expert witness in efficiency cases around the country for the past 25 years.

D. No Other Party Adequately Represents ELPC’s Interests.

FirstEnergy questions whether other parties represent ELPC’s interests. *Memo Contra* at 4. FirstEnergy focuses on ELPC sharing an address at the Ohio Environmental Council (OEC). However, if ELPC’s interests were the same as OEC’s, ELPC would not have gone to the time and expense of opening an Ohio office. It is not unusual for non-profit, public interest organizations to share space as a cost-savings measure. As stated in its Motion to Intervene,

³ Other examples include, “AICUO will advocate legal positions which seek to ensure that any competitive bidding process to be approved is conducted in a fair and open manner whereby optimal participation by eligible entities is achieved allowing for the best possible EE&DR program at the greatest efficiency and lowest possible cost.” *See*

ELPC is a regional environmental and eco-business advocacy organization. *Memo in Support* at 5. ELPC is interested in how the programs will affect Ohio, and also how they will affect the Midwest. No other intervenor focuses its efforts on regional environmental health or economic development. FirstEnergy will impact the environment in Ohio and around the Midwest by changes to its generating plants. ELPC is interested in both the environmental health of Ohio and that the AEPS is used as an economic development tool.

Ohio is positioned to be a leader in the region for economic gain through efficiency and renewable energy technologies. However, those economic benefits will only materialize through a utility's effective and successful programs. ELPC wants to ensure that Ohio receives the economic and job creation benefits promised by the AEPS, while protecting the area's environmental health. Because no other party advocates at the intersection of environmental health and economic development in Ohio, no other party can adequately represent ELPC's interests.

III. Conclusion

ELPC meets the requirements necessary to intervene in this proceeding, and it respectfully requests that the PUCO grant its Motion to Intervene. ELPC's legal position will not unduly delay the proceedings, and other parties do not represent ELPC's interests, ELPC respectfully asks this Commission to grant the Motion to Intervene.

Respectfully submitted,

/s Michael E. Heintz

Michael E. Heintz (0076264)
Environmental Law & Policy Center
1207 Grandview Ave.
Suite 201
Columbus, Ohio 43212
Telephone: 614-488-3301
Fax: 614-487-7510
E-mail: mheintz@elpc.org

Attorney for the Environmental Law &
Policy Center

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Intervene has been served upon the following parties, electronic mail or regular U.S. Mail, postage prepaid, this 14th day of January, 2010.

/s Michael E. Heintz

Michael E. Heintz

Kathy J. Kolich
Ebony L. Miller
Arthur E. Korkosz
FirstEnergy Service Company
76 South Main St.
Akron, Ohio 44308
kjkolich@firstenergycorp.com
elmiller@firstenergycorp.com
korkosza@firstenergycorp.com

James F. Lang
Laura C. McBride
N. Trevor Alexander
Kevin P. Shannon
Calfee, Halter, & Griswold, LLP
1400 Key Bank Center
800 Superior Ave.
Cleveland, Ohio 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com
kshannon@calfee.com

Counsel for Ohio Edison Company, the
Cleveland Illuminating Company, and the
Toledo Edison Company

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620

Duane Luckey
Assistant Attorney General
Chief, Public Utilities Section
Public Utilities Commission of Ohio
180 E. Broad St., 6th Floor
Columbus, OH 43215

Counsel for the Public Utilities Commission of
Ohio

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Jacqueline Lake Roberts, Counsel of Record
101 Federal Street, Suite 1100
Boston, MA 02110
jroberts@enernoc.com

Counsel for Enernoc, Inc.

Michael K. Lavanga, Counsel of Record
Garrett A. Stone
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, D.C. 20007
mkl@bbrslaw.com
Ras@bbr5law.com

Counsel for Nucor Steel Marion, Inc.

Will Reisinger, Counsel of Record
Nolan Moser
Trent A. Dougherty
Ohio Environmental Council
1207 Grandview Avenue
Columbus, OH 43212
nolan@theoec.org
will@theoec.org
trent@theoec.org

Counsel for The Ohio Environmental Council

Michael L. Kurtz
David F. Boehm
Boehm, Kurtz, & Lowry
36 East Seventh St.
Suite 1510
Cincinnati, Ohio 45202
mkurtz@BKLawfirm.com
dboehm@BKLawfirm.com

Counsel for the Ohio Energy Group

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793

Counsel for Ohio Partners for Affordable
Energy

Samuel Randazzo
Lisa G. McAlister
Joseph M. Clark
McNees, Wallace & Nurick
21 East State Street, 17th Floor
Columbus, OH 43215-4228

Counsel for the Industrial Energy Users

Henry Eckhart
50 West Broad Street
#2117
Columbus, Ohio 43215
henryeckhart@aol.com

Counsel for the Natural Resources Defense
Council

Theodore S. Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217

Joseph P. Meissner
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, Ohio 44113
Jpmeissn@lascleve.org

Counsel for Neighborhood Environmental
Coalition, Consumers for Fair Utility Rates,
The Empowerment Center of Greater
Cleveland, and the Cleveland Housing
Network

Christopher L. Miller
Andre T. Porter
Gregory H. Dunn
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, Ohio 43215

Counsel for Association of Independent
Colleges and Universities of Ohio

Jeffrey L. Small
Gregory J. Poulos
Christopher J. Allwein
Office of the Consumers' Counsel
10 W. Broad Street, Suite 1800
Columbus, OH 43215-3485

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Summary: Reply to FirstEnergy's Memorandum Contra to Motion to Intervene by the Environmental Law and Policy Center electronically filed by Mr. Michael E Heintz on behalf of Environmental Law and Policy Center